# United States Court of Appeals for the Second Circuit



# APPELLANT'S BRIEF

77-1042

No. 77-1043

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MARX R. JACKSON

Defendant-Appellant.

On Appeal From the United States
District Court
For the Southern District of New York

BRIEF FOR APPELLANT

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### STATEMENT OF ISSUES PRESENTED FOR REVIEW

1(a)

Where the government produces a witness in a criminal case, whose only expected contribution to the case is to testify about conversations with another government witness inculpating the defendant, and where the witness has previously made statements to the grand jury about the conversations, but claims on direct examination, to have no recall of the conversations, nor any recall about his grand jury testimony, does not the Court substantially and prejudically abridge the defendant's right to Confrontation and the ancillary right to cross-examination assured by the Sixth Amendment, where the Court admits the witness' grand jury statements in evidence for their substantive value under Rule 801(d)(1)(A).

1(b)

Where an examination of the grand jury statements, noted above, discloses that they consist entirely of the declarations of a person other than the witness called to testify about the declarations, and the declarant in the statement had previously testified as a government witness, but was not called upon to give any testimony about his incriminating conversations with the defendant, is not the abridgement of the defendant's Confrontation and cross-examination rights exacerbated by introduction of the grand jury statements.

Where the proceeding in the grand jury that produced the so-called prior inconsistent statements, consisted entirely of the prosecutor asking leading questions that have no time frame, no reference as to locations, and no apparent relationship to the offenses charged, which all require and compel a "yes" answer, and the statements are patently inculpatory of the defendant, does not the manner in which the grand jury proceeding was conducted violate the defendant's right to due process, so as to render inadmissible the grand jury statement as substantive evidence in the defendant's criminal trial.

#### II.

Does venue exist in the United States District Court for the Southern District of New York to try a substantive federal offense of narcotics possession (Count 6 in the indictment) brought against the defendant and another (an alleged distributor of drugs) where the evidence clearly shows that the defendant was never in the jurisdiction of the Court at the time alleged and that the alleged transaction, in so far as it involves the appellant, took place in the District of Columbia.

#### STATEMENT OF THE CASE

#### 1. The Indictment

#### (a) Return

In the Court below (United States District Court for the Southern District of New York) a seven count indictment was returned and filed, marking the start of criminal case number 76 Cr. 274. This indictment was brought against nine persons: Raymond Anderson; JoAnn Jones; Arletha Franklin; Robert Moore; Virgil White; Bernard Johnson; Marx Jackson, Joe King, and Edith Rivers. The charges set forth in the indictment alleged violations of certain provisions of the federal narcotic laws (Controlled Substance Act), with a lead count of conspiracy binding together all the defendants and the other charges.

#### (b) Conspiracy

The conspiracy count charged that from about the 1st day of July 1972 to the date of the return of the indictment, within the jurisdiction of the Court, all the defendants, together with one Earl Rivers and others unknown, unlawfully conspired to distribute and possess with the intent to distribute heroin and cocaine, scheduled narcotic drug controlled substances, in violation of 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. The roles of the various defendants were described in the indictment as follows: (1) Raymond Anderson was a supplier of heroin doing business in New York City; (2) Earl Rivers, Edith Rivers, JoAnn Jones and Arletha Franklin were couriers who carried packages of heroin from Anderson to the buyers in other cities in the United States; and (3) Robert Moore (Williamsport, Pennsyl-

vania), Virgil White and Bernard Johnson (Atlanta, Georgia), Marx Jackson and Joe King (Washington, D.C.) were the bulk purchasers of heroin. Sixteen overt acts were set forth as being in furtherance of the conspiracy.

#### (c) The Substantive Counts

The other charges in the indictment were that: in count two, Raymond Anderson was charged with engaging in a continuing criminal enterprise in the jurisdiction of the Court from about the 1st day of October 1972 to the return of the indictment in violation of Title 21 U.S.C. §848; Raymond Anderson and the several other defendants were charged in counts three through five with specific acts of distribution or possession with intent to distribute certain stated quantities of heroin (in violation of Title 21 U.S.C. §812, 841(a)(1) and 841(b)(1)(A)), that took place during the period of the alleged conspiracy and within the jurisdiction of the court. defendant Marx Jackson was charged in only one of the substantive counts (six), with that, in the month of February 1974, in the Southern District, he and Raymond Anderson distributed and possessed with intent to distribute, approximately one eighth kilogram of heroin.

# 2. Pre-Trial Proceedings

On June 24, 1976 the Defendant Marx Jackson was arraigned in open court. He pleaded not guilty. The case was assigned to District Judge William C. Conner. Various motions were filed on behalf of the Defendant Jackson, including one for a bill of par-

ticulars (to which the Government responded); and a motion to dismiss count six for want of venue.

### 3. The Trial

#### (a) Defendants on Trial

The case came before the Court (Conners, J.) for jury trial on November 10, 1976. Only the defendants JoAnn Jones, Arletha Franklin, Virgil White and Marx Jackson proceeded to trial in this case. Raymond Anderson, Bernard Johnson and Joe King were in a fugitive status. The indictment was dismissed against Robert Moore. Edith Rivers pleaded guilty to the conspiracy count before the trial and she was severed from the case.

#### (b) The Government's Case

The government called a host of witnesses in its case in an effort to prove the charges against the defendants, notable among these witnesses, were Earl Rivers and Edith Rivers. Toward the end of its case, the Government called one Sampson Williams as a witness to give testimony against the defendant Marx Jackson. Before he was permitted to testify the Court explored outside the presence of the jury certain "problems" attending his appearance as a witness. Sampson Williams had testified before the grand jury in this case under a grant of immunity, after he had invoked his Fifth Amendment privilege against self incrimination. He told Judge Conners that he would refuse to testify for the government in this case on the same grounds. At the request of the government, the Court conferred immunity upon him. Even so, the witness

announced that he knew nothing about the case. The prosecutor urged that consonant with the provisions of Rule 801(d)(1)(A) of the Federal Rules of Evidence and the law in this circuit, the government could use the grand jury testimony of /illiams as substantive evidence in the case, in the event that Williams testified in a manner that was inconsistent with his grand jury testimony. The Defendant Marx Jackson objected. The Court agreed with the prosecutor's position. Whereupon, the government was permitted to call Williams as a witness in this case. As to questions put to him by the presecutor, he gave negative answers. The prosecutor then questioned Williams about his testimony at the grand jury. In each instance where he was asked about his grand jury testimony, the witness said he did not recall it. Under cross examination by counsel for Marx Jackson, his performance was the same: Williams testified that he could not recall his grand jury testimony. Nevertheless, and over the objection of Marx Jackson (based upon the denial of Sixth Amendment right to confrontation), the court admitted into evidence the questions and answers from Williams' grand jury transcript about which the prosecutor had questioned him.

# (c) Objection about Venue

At the close of the Government's case, the Defendant
Marx Jackson moved the court to dismiss count six against him for
want of venue. The Government's evidence on this count was that
on an unknown date in February 1977, Earl Rivers, who was in
Williamsport, Pennsylvania, received a telephone call from Marx

Jackson (who presumably was in Washington, D.C.) to the effect that he wanted some drugs. As a result, Rivers travelled to New York City (Southern District) and obtained some drugs from Raymond Anderson and took them to Jackson in Washington, D.C. The court denied the motion to dismiss, finding that under the evidence there was venue for the offense.

#### (d) The Defendant's Case

All of the defendants presented defense evidence, and each testified. Marx Jackson denied that he was involved in any narcotics conspiracy and particularly the one charged in this case. He also denied participation in the count six offense. He called one Viola McMichaels as a witness to support his version of the date of an incident when Earl Rivers came to Jackson's mother's house. This version was contradictory of the testimony of Earl Rivers.

#### (e) Verdict and Sentence

The trial concluded on November 30, 1976. The jury returned its verdict on the same day. It found all four of the defendants on trial guilty of all the offenses charged against them. As to the Defendant Marx Jackson, the finding was guilty on Counts One and Six.

On January 13, 1977, the Court sentenced Marx Jackson in the case as follows:

imprisonment, pursuant to Title 18, U.S. Code, Section 4208(a)(2), for a period of Five (5) YEARS, on each of Counts 1 and 6, to run

concurrently with each other, and with sentence imposed by United States District Court of the Eastern District of Virginia, for unauthorized possession of a motor vehicle. Defendant is placed on Special Parole for a term of THREE (3) YEARS, to commence upon the expiration of his confinement, pursuant to the provisions of Title 21, U.S. Code, Section 841. This appeal followed.

(See Docket entries and Judgment and Commitment, which are reproduced in Appendix of Appellant Marx Jackson. Also see transcript of District Court proceedings of January 13, 1977 at p. 12-13).

 $<sup>{\</sup>tt N.B.}$  Hereinafter, the reference (Tr. ) relates to pages in the transcript of the trial proceedings.

#### STATEMENT OF THE FACTS

- Witnesses Earl Rivers and Edith Rivers: An Overview of the Government's Case.
- A. The Defendants, Other Than Marx Jackson.

The principal Government witnesses in the trial of this case were Earl and Edith Rivers. Both were named in the indictment; Edith, as a co-defendant and Earl, as an un-indicted co-conspirator. Each gave testimony against the defendant Marx Jackson; and, indeed against all the defendants, those on trial, as well as the others who were not parties to the trial.

Earl Rivers went to prison on August 17, 1970 to serve a three year prison term for federal counterfeiting offenses. He served the latter part of this sentence in the penitentiary at Allenwood, Pennsylvania (Tr. 436-437,619). There, he became acquainted with a fellow prisoner named Raymond Anderson,

I/ Edith Rivers' true name was Edith Graves. She was commonly known by the name "Angel"; and was so referred to throughout the testimony in this case. She was charged in the conspiracy count (count one) and named in two of the overt acts (nos. 5 & 10). She was also charged, along with Raymond Anderson and Arletha Franklin, with the substantive offense of distribution and possession with intention to distribute one eighth kilogram of heroin in the month of December 1973 (count three). About a week before the trial of thise case began, she entered a plea of guilty to count one of the indictment and her case was severed (Tr. 30).

<sup>2/</sup> Their testimony about Marx Jackson is set forth later here.

<sup>3/</sup> Earl Rivers knew Raymond Anderson by the name of "Slim" (Tr.332) Quite frequently during his testimony, Rivers, as well as other witnesses, referred to Anderson as "Slim". Anderson is the lead defendant in the indictment. He is named as a defendant in each count.

with whom he became very friendly. (Tr.332) They were released from Allenwood at about the same time, Anderson on September 19, 1972, and Rivers on September 21, 1972. Anderson told Rivers to stay in touch with him after he was released. He gave Rivers the phone number to a restaurant he owned or operated, and another phone number to a record shop. Anderson promised to arrange for Rivers to receive narcotics. (Tr.333) Upon his release from prison, Rivers went to Washington, D.C. to live. (Tr. 619) Within a few days, he received a phone call from Anderson. Anderson told him to stay in touch with him and he would soon be "in shape". (Tr. 333) A few days later, Rivers received another phone call from Raymond Anderson. He told him that "the thing" was due the next day. Rivers went to New York City and purchased a quarter kilogram of heroin from Anderson for the price of \$7,500. This purchase was made sometime in 1972. Rivers made no additional purchases during the year 1972 from Anderson. After Rivers was released from prison, he lived back and forth between Washington and New Jersey. (Tr. 335) In early 1973, he began keeping company with Edith Graves. In September of 1973, he moved to Williamsport, Pennsylvania; Angel remained in Washington for a while. When Earl Rivers moved to Williamsport, he lived for a couple of weeks at a Holiday Inn.

 $<sup>\</sup>frac{4}{\text{Tr. 616}}$ . Prior to 1970 Rivers had been in the business of selling drugs.

 $<sup>\</sup>frac{5}{\text{He}}$  During 1973 (until November) Rivers made his living selling drugs. He was mostly buying the drugs in Baltimore at that time (Tr. 337)

<sup>6/</sup> He took narcotics to Williamsport. (Tr.338) The defendant JoAnn Jones went there with him; and Rivers kept his narcotics at her residence up to around mid-November 1973. (Tr.339)

He moved into an apartment sometime during November 1973. Around November 20 or 21, Rivers received a telephone call from Anderson. Anderson told him that he had "something good" and wanted Rivers to come see him (Tr.339,346) On the next morning, Rivers, and JoAnn Jones traveled to New York by car. They went to Anderson's restaurant. At the restaurant JoAnn Jones received a package of narcotics (heroin) from an unknown girl while the two of them were in the restroom. Rivers received a small envelope with an ounce of cocaine in it from the girl also. (Tr.343) When Rivers and JoAnn returned to Williamsport, they went to Rivers' apartment where he diluted the heroin and packaged it. After the drugs were cut, Rivers telephoned the defendant Arletha Franklin. She came to the apartment; and along with Rivers, JoAnn and another lady, they further cut and then packaged the narcotics. Rivers made arrangements with Arletha Franklin to keep the drugs at her house for him. He agreed to pay her \$300 to \$500 a week for doing so.

In the meantime, Angel had moved to Williamsport to live with Rivers. About a week after the trip by Rivers and JoAnn, rivers and Angel traveled to New York and went to Anderson's restaurant. (Tr. 350,351) Rivers gave Slim the money that he owed him for the drugs he had received earlier. Anderson and a girl left the restaurant to get a package of narcotics for Rivers. When they returned, the girl transferred the package

 $<sup>\</sup>frac{7}{(\text{Tr.}341)}$  Located at 222 8th Avenue, between 118th & 119th Streets.

<sup>8/</sup> The drugs were sold for Rivers by the defendant Bobby Moore, who picked them up at Arletha's house. Moore was an associate of Rivers who lived in Williamsport. (Tr. 349-350; 604-615)

to Angel in the restroom. Angel and Rivers returned to Williamsport. In Williamsport, JoAnn and Arletha, came over to Rivers' apartment, and the drugs were cut and packaged and taken back to Arletha's house. This second package was an eighth of a kilogram of heroin. Arletha Franklin stored the drugs at her house and they were eventually sold by Bobby Moore. (Tr.353) Later, Rivers went back to New York and got more drugs. In all, he estimated he made 10 or 12 trips, over the period from November 1973 to March 1974. (Tr.353) Anderson was always the source of the drugs. (Tr. 354) After the drugs were obtained in New York, Rivers would take them back to Williamsport, cut them, package them and take them to Arletha's house (Tr. 355). Practically every package of drugs was sold by Bobby Moore. There was one trip that was made in early December by Rivers, Angel, and JoAnn. (Tr. 355) Also, in December 1973, Rivers, Angel, and Arletha made a trip. Bobby Moore made one trip with Rivers; and that was in December 1973. (Tr. 356) On several occasions, Rivers sent Angel to New York to get the drugs from Anderson. These trips by Angel were usually made by Trailways Bus. (Tr. 358) The packages would be one eighth kilogram of heroin. Once, in early December 1973, when Rivers sent Angel to New York to get some drugs for him, Arletha and Angel's sister, Delzora Graves, and a girl from South Carolina named Pat Smith accompanied Angel. (Tr. 359)

Rivers made trips to other cities, carrying heroin. The first such trip was to Atlanta, Georgia, in the last part of December 1973, or early January 1974. Rivers drove to Atlanta, along with

Angel, a man named John Green, and a girl named Pat Smith.

In Atlanta, he met with the defendants Virgil White and Bernard Johnson. Rivers had brought them a quantity of heroin. (Tr. 374-375) He cut and packaged these drugs for them at the home of Virgil White. On this trip he stayed in Atlanta roughly seven to nine days. (Tr. 378)

A second trip to Atlanta was made (sometime in January 1974) about two or three weeks after the first one. (Tr. 87) Rivers and Angel picked up heroin from Anderson in New York and they traveled to Atlanta and met with Virgil White and Bernard Johnson. At Bernard's house, the four of them cut and bagged the drugs.

These packaged drugs were given to either Virgil or Bernard.

(Tr. 88) Rivers and Angel stayed in Atlanta about a week. (Tr. 88).

# B. The Defendant Marx Jackson

At a time beginning in early 1973 (around February or March) to September 1973 (when Rivers went to live in Williamsport), he would see the defendant Marx Jackson (Moxie) in Washington, D.C. The nature of their acquaintance was very casual. They both knew some of the same people. Rivers would see Jackson often in bars, restaurants, and "after-hours" clubs in the area of 9th and U Streets. They were in each other's close company on only a few of these occasions and they would engage briefly in light social conversations about different people. On a few times, Rivers placed numbers (lottery) bets with Jackson, who was writing numbers. (Tr. 675-676) Before she moved to Williamsport, Edith Rivers saw

the defendant Marx Jackson in Wachington on 9th Street "a lot of times." (Tr. 75) She didn't know him personally (Tr. 209); and never had a conversation with him (Tr.210)

Earl Rivers testified about a trip that he took to Washington with Slim Anderson on January 16, 1974. (Tr. 385-396) On an occasion when he had just returned home to Williamsport from  $\frac{9}{4}$  Atlanta, he received a telephone call from Anderson. Anderson wanted to go to Washington, D.C. to see Joe King about some money King owed him. He asked Rivers to go with him. Within a few hours after the call, Rivers traveled to New York City. He went to Anderson's restaurant, arriving about 4:30 or 5:00 that evening. (Tr. 386) At about 7:30 that evening, he, Anderson, a young lady and a man named Jack, left New York in Anderson's car.

They reached Washington about 11:00 or 11:30 that night. They drove to 9th and U Streets, to a place called Harrington's Lounge. As the car was parking, Rivers saw the defendant Marx Jackson standing near by. He told Anderson "there is your boy, Moxie, over there" (Tr. 387). Anderson told Rivers to tell Jackson that he wanted to see him. Rivers got out of the car and went

<sup>9/</sup> Apparently, the second trip, see supra p. 11.

<sup>10/</sup> According to Rivers, Anderson told him that this person Jack was his bodyguard. (Tr. 387).

<sup>11</sup>/ The Anderson-Rivers party cameto Washington to see Joe King. It was only by chance that they saw Marx Jackson. (Tr. 686-687).

 $<sup>\</sup>frac{12}{Jackson}$  knew that Jackson and Anderson were acquainted. (Tr. 686)  $\overline{Jackson}$  testified that he knew Anderson from Lewisburg Penitentiary, when they were both there in 1971 or 1972 (Tr. 1477).

across the street and spoke to Jackson, telling him that, "Your boy Slim is across the street." (Tr. 388) Both of them walked over to Harrington's Lounge, where Anderson, the girl and Jack were. As Rivers and Jackson walked into Harrington's Lounge, Rivers saw a person named Sampson Williams standing there.

Rivers said something to Sampson. (Tr. 399)

Jackson and Rivers walked inside the restaurant where they sat down with Anderson and the girl. Sampson Williams was standing by the door. Jackson said to Slim something to the effect that, "Boy we can get rich here if you got the right thing." (Tr. 390) Anderson replied, "Well, I got it." He said to Jackson, "Well boy, let's talk." Rivers walked away. As Rivers went to walk away, he turned and started to say something to Sampson . Williams. Jackson said, "Look, Boy, Don't say nothing to anybody, boy. I can get all of this." (Tr. 390) Rivers didn't say anything else. He went to the restroom and came back. When he returned, they decided to go to the Aspen Inn.

They got in Anderson's car and went up to the Aspen Inn.

Marx Jackson followed them in his car. At the Aspen Inn, Rivers introduced Slim to a man called Catfish, who ran the bar there.

<sup>13/</sup> The witness was about to say what he told Sampson Williams, but defense counsel objected. Before the court ruled on the objection, the prosecutor determined that, though Jackson was present at the time, he was not a part of the conversation. Apparently for this reason, the prosecutor cautioned the witness: "Don't tell us anything you didn't say in front of Moxie." (Tr. 389)

 $<sup>\</sup>frac{14}{20}$ , When Earl Rivers testified before the Grand Jury (on February  $\frac{1}{20}$ , 1976) about this conversation, he said that Jackson's remark to Anderson was "Hey, man, we can get rich if your thing is on time." (Tr. 692).

<sup>15/</sup> Raymond Anderson, the girl, Jack and Rivers.

Jackson said to Rivers "Man, I told you I could take care of all this here. Just be cool." Rivers did not say anything. He went over to the side of the bar and sat with a girl named Rose. Jackson, Slim, Catfish, and the girl who was with Slim, sat together. Jack—sat at a table by himself. Rivers was in ear-shot of some of the conversation that was going on between the party sitting together; and he heard Jackson say that there was nothing in town, that if Anderson had anything that was any good, that they could get rich. (Tr. 392) Rivers left the Aspen Inn while Jackson, Anderson and the others continued their conversation. He spent the night at another location. Before he left the Aspen Inn he did register for a room. (Tr. 393)

Anderson and the girl spent the night at the Aspen Inn.

On the next morning, Rivers made arrangements for Anderson to see Joe King. After they met, Rivers, Anderson, the girl, and the fellow Jack, drove back to New York City. When they reached New York, Anderson left Rivers at his restaurant. He came back later and gave Rivers two packages. There were two ounces of cocaine and two ounces of heroin, that Anderson told Rivers to take to Washington to Moxie. Anderson also gave Rivers an eighth of heroin for himself. Rivers took a bus to Washington. He reached Washington on the same evening. He telephoned two

<sup>16/</sup> Government's Exhibit #6 was a registration card for a room at the Aspen Inn for the date January 17, 1974. (Tr. 685,699) The room was used by the man Jack. (Tr. 700)

<sup>17/</sup> Government's Exhibit #7 was also a registration card.

numbers that Jackson had given him, but could not reach him on the phone. Later, he saw a girl who knew Jackson and she took him to Jackson's mother's house. He saw Jackson, and gave him the packages. Jackson gave him a spoon of cocaine and two hundred dollars, after which, Rivers left. (Tr. 397) He took a bus to Williamsport.

Sometime later in January, Rivers received a call from Jackson telling him that he wanted to get some more stuff. (Tr. 403) Rivers had recently been in Atlanta and had stopped in Washington for a while on his return to Williamsport. The phone call from Jackson came about a day or sc after his return. At about the same time, Rivers received a phone call from Virgil White and Bernard Johnson saying that they were coming to Williamsport. This was still during the month of January. He asked Virgil White to stop in Washington on his way to Williamsport and see Moxie because he might have some money to send to New York for Slim. He gave Virgil White the telephone numbers that Moxie had given him. A few days later, Rivers saw Virgil and Bernard in Williamsport. (Tr. 404). They told Rivers that they had met Moxie in Washington but that he would not give them any money, saying that the money situation Rivers, Virgil and Bernard was arranged with Slim. (Tr. 405) left Williamsport and went to Newark, where they stopped at a few clubs and then drove to New York. In New York, they went to Anderson's restaurant where Rivers introduced Virgil and Bernard

 $<sup>\</sup>overline{18}/$  Both Virgil White and Marx Jackson testified in their own behalf in this case. Each categorically denied that any such meeting ever took place between them.

to Anderson. From Anderson, Rivers got an eighth of dope for Virgil and Bernard. Rivers, Virgil and Bernard then drove to Washington. They went to 9th & U Street, where Rivers usually saw Jackson. Bernard and Virgil let Rivers out of the car, and they went on to Atlanta, taking their eighth. (Tr. 410) Rivers began to look for Jackson. He called him several times and got no answer, finally, he caught him at his mother's house. They met on New Hampshire Avenue in Washington, where Rivers gave him the package. Jackson gave Rivers a couple hundred dollars and some cocaine. Rivers then returned to Williamsport on a bus. (Tr. 411)

Rivers heard from Jackson again about a week to ten days later. (Tr. 411) Jackson called him and asked him to "make another move." (Tr. 412) On the next morning, he and Angel went to New York and picked up the package for him. (Tr. 413) This was about the 1st of February. It was picked up at Slim's restaurant at about two or three o'clock in the morning. He and Angel drove to Washington. (Tr. 414). They stayed a few hours at her mother's house and then went to meet Jackson early in the morning, around 6:30 or 7:00 A.M. The meeting was somewhere in the Georgia Avenue area. Jackson was driving an old gray Ford, about 1955 or 1956 model. He pulled his car up behind their car, exited and came up to their car. Rivers was driving and Angel was sitting next to him. Moxie entered their car and sat in the back seat. Angel handed him the package. He

gave Rivers a couple hundred dollars and some cocaine and then he left and said from then on, he would make arrangements to take care of himself. Rivers and Angel drove back to Williamsport, Pennsylvania.

 $<sup>\</sup>frac{19}{\text{The}}$  testimony of Edith Rivers regarding this (the meeting with the defendant Jackson), is at Tr. 73-75.

## 2. The Witness Sampson Williams

# A. Preliminary Proceedings Out Of The Presence Of The Jury

Toward the end of the government's case in-chief, the prosecutor announced that he was going to call one Sampson Williams as a witness (Tr. 943). This announcement took place while the jury was absent. The prosecutor told the Court that Mr. Williams had previously appeared before the Grand Jury "in this matter", and had claimed his Fifth Amendment privilege. He was granted immunity by Order of another District Court judge; and thereafter testified. The prosecutor said that Mr. Williams may invoke his privilege under the Fifth Amendment in this case. He asked the Court to allow him to ask Williams a question or two out of the presence of the jury, and if he pleaded the Fifth Amendment, then he would ask the Court to confer immunity upon him again. At this point the prosecutor, at the request of the Court, had the letter from the Justice Department requesting immunity marked as the Court's Exhibit #3.

The witness, Sampson Williams, was brought into the Court (out of the presence of the jury) and sworn as a witness. The prosecutor asked him a preliminary question, and then directly asked Mr. Williams whether it was his intention to plead the Fifth Amendment if he were asked questions in front of a jury. The witness responded yes. Whereupon, the prosecutor asked the Court to confer immunity upon the witness pursuant to Section 6002 of the Criminal Code. This was done; and the Court also gave Mr. Williams certain advices about the meaning of the immunity that was being conferred (Tr.946). At the request of one of the defense attorneys (Mr. Curley), the

Court asked the witness whether, in view of the fact that he had been granted immunity, he was willing to testify as to what he knew about this matter. The witness responded that he did not know anything about the matter. At this point a discussion ensued between counsel representing the various defendants and the Court as to whether Mr. Williams was indeed going to give any testimony in the presence of the jury. The defense attorneys were trying to ascertain whether there would be any "problems" (Tr. 953-954). The witness was excused from the room. Counsel for the defendant Jackson, asked the Court to determine whether the witness Williams was going to give testimony in this case (Tr. 955). In response, the Court asked would it be satisfactory if Mr. Williams was brought into the courtroom to ascertain his intentions. After further discussion the witness was brought back into the courtroom (again, out of the presence of the jury). He was asked by the Court if he were willing to tell what he knew in view of the grant of immunity (Tr. 958-959). The witness answered: "I say what I said before. I don't know anything about the matter". 20 (Tr. 959). The Court reminded the witness that he had been interviewed by Drug Enforcement agents; by the Assistant United States Attorney; he had given testimony before the Grand Jury; and that the Government believed that he had testimony that was relevant to the case.

<sup>20</sup>/ The Court asked him if he were willing to say what he did know. He responded: "Well, I don't know anything." (Tr. 959).

The Court informed the witness that it was attempting to learn in advance if he were willing to testify. Again, the witness repeated "I don't know anything about this case" (Tr. 959). The Court requested the prosecutor to ask the witness a couple of the questions that he would ask him before the jury. Reluctantly, the prosecutor began to question the witness. The prosecutor asked whether he knew Earl Rivers, and a few more questions (Tr. 961-962). Then, eventually, whether he knew a person named Moxie (Tr. 962). The witness said that he did know a Moxie and that it could be said that he had been in contact with him relatively frequently. The prosecutor next asked him whether he ever had a conversation with Earl Rivers in which he indicated to the witness that he would fix him up with his heroin source in New York City. To this question, the witness answered, "Not that I can remember" (Tr. 963). At this point the prosecutor had the Court excuse the witness, because there was a legal argument that he wanted to make (Tr. 963).

The prosecutor then said to the Court that it appeared that the witness was going to contradict what he had earlier said under oath in the Grand Jury, because there the witness had specifically said that he had a conversation with Earl about getting heroin.

The prosecutor continued, saying that the law was clear that if a person is impeached with his prior statement under oath in a Grand Jury, the evidence comes in as affirmative proof. The prosecutor cited as his authority the Federal Rules of Evidence and the decisions in the Second Circuit. The Court ruled that it was going to

permit Government counsel to impeach Mr. Williams because under the Federal Rules of Evidence, it was permissible, even though the prosecutor knew in advance that the witness was going to refuse to testify. The Court said that once the witness appeared in Court to give testimony the prosecutor could use the Grand Jury testimony. Counsel for the defendant Jackson objected to the Court's ruling, and also noted his objection to the proceedings that he anticipated would take place, that is, "in using the witness as a vehicle to introduce his prior statements under oath as primary evidence in this case..." Counsel pointed out that what took place in the Grand Jury was that Mr. Davis (the prosecutor) asked leading questions of the witness and had the witness to affirm them with a "yes" answer. Counsel complained that the questions were "loaded" (Tr.965); and asked the Court to look at the transcript of the Grand Jury testimony of the witness. Counsel argued that what the prosecutor proposed to do in this case was to present a recalcitrant witness before the jury and "use him as a conduit of what was presented before the Grand Jury, and have the jury receive that as affirmative evidence." (Tr. 966). Counsel made this point over and over again (Tr. 966-967). The Court's answer was that it didn't believe that counsel's reasons were grounds for excluding the Grand Jury testimony all together; but that on request, he would instruct the jury that they may take into account, in determining the weight to be given to the evidence, that it was given in response to leading questions, if that was the fact (Tr. 967). Counsel for the

defendant Jackson continued his objections in this vein (Tr. 968), saying that he objected to it because some of the questions that were asked in front of the jury were improper and they were ambiguous; and that if the witness refused to answer questions before the jury in this case that counsel could not cross examine the Grand Jury transcript. The Court ruled that counsel would have the opportunity to ask questions of the witness so that he could explain his testimony, and that if the witness sat mute, there was nothing the Court could do about it. The Court further said that it could not possibly prevent the prosecutor from asking him questions covered in the Grand Jury testimony. And, moreover, the Court said that if the witness said he didn't know (anything about the matter), the prosecutor could use the Grand Jury testimony to impeach him; and also use the Grand Jury testimony as affirmative evidence (Tr. 968-969). The Court directed that the case proceed.  $(Tr. 972).\frac{21}{}$ 

<sup>21/</sup> At this point, one of the other defense counsel (Mr. Landau), voiced an objection on behalf of his client (Virgil White), and asked for a severance of his client's case from that of Mr. Jackson, "because it is my belief that what is going to occur now with reference to this witness, would so greatly prejudice the case that it is got to spill over against Virgil White." (Tr.972). Another defense counsel, (Ms. Friedman), made a similar motion on behalf of her client (Arletha Franklin). The Court overruled all these motions; and asked the prosecutor whether he had weighed the risk of calling this witness against the advantages that might accrue to the Government. The government responded that it had. (Tr. 972-973).

The court expressed concern about whether grounds for mistrial might be created by the prosecutor calling a witness where there was a fair indication in advance that he was going to assert either a lack of knowledge or memory about the things he was to be asked about, with the result that his grand jury testimony would be used as evidence in the case (Tr. 974). At this point, counsel for the defendant Marx Jackson, made a statement to the court:

"In that connection, your Honor, may I pass up to the Court just three pages of questions and answers given by Mr. Williams before the Grand Jury on February 24, 1976, and you will see, your Honor, from those questions and answers that there is no time frame provided in the questions. The questions are extremely leading and extremely prejudicial, and this is what is going before the jury, your Honor. This is what I object to. I don't think that the government can transport into the evidence of this case those kinds of questions and answers as evidence against any of the defendants in the case, and particularly against Mr. Jackson.

"This is at the heart of what I am complaining about." (Tr. 974-975).

To illustrate counsel read a portion of the Grand Jury transcript of the testimony of Sampson Williams, beginning at page 9 thereof. (Tr. 975). Counsel covered a few of the questions that appeared in the transcript and then said to the Court:

"...Now Mr. Sampson Williams sitting on the witness stand is going to be a conduit by which this kind of questions and answers are going to be implanted into the evidence of this case and it just offends me, your Honor, that the government can engage in this kind of practice. He isn't charged as a co-conspirator, your Honor. The questions are very broad, very general, no time reference. We don't know what Earl he is talking about. We don't know what Moxie he is talking

about. Yes, incidentally he knows -- might know the defendant Marx Jackson on trial but are we going to clear up that that is who he is speaking about there? Is it going to clear up? He said he doesn't know Earl Rivers." Tr. 976-977.

In justification, the prosecutor argued to the Court that the statements that appeared in the Grand Jury testimony were admissible as co-conspirator declarations. Counsel for the defendant Marx Jackson, objected because:

"If at the time that these statements, whatever they may be, were made, first off, were they made by a conspirator and were they made in furtherance of the conspiracy? And before they would be admissible as evidene against any of the defendants, the defendants must have been a member of the conspiracy at the time the statement was made." Tr. 978.

The government's response to these objections was: that there was a tie-in between what was set forth in the Grand Jury testimony of Sampson Williams and the previous testimony of the witness, Earl Rivers; and that the jury could only find that the evidence related to the same events about which Earl Rivers had previously testified to (Tr. 979). Counsel for the defendant Jackson responded as follows:

"Of course that is convenient for you to say that, but I would submit, your Honor, that there is no time frame here.

"We don't know whether they are talking about the same people. We don't know whether they are talking about the same event, and I am not responsible, your Honor, because the government tends to ask loose, rambling, general, broad questions before the Grand Jury, and I don't think that that's the purpose for

which they do it. I don't think that my client should suffer, your Honor, because of the fashion in which the government is permitted to run the Grand Jury. After all, we are in a trial, we are not before the Grand Jury, and that's the kind of evidence that the government is trying to introduce in this trial. You know, otherwise, your Honor, they could have prepared the entire case in the Grand Jury and just bring witnesses in here who say "Well, I am not going to testify,: and what we will get is just a shifting of all the Grand Jury testimony into the evidence of this case." Tr. 979-980.

In this colloquy, counsel spoke directly to the question of the defendants' Sixth Amendment right to confrontation:

"... What about Mr. Jackson's Sixth Amendment right to confrontation. That is very basic. How does Mr. Jackson defend himself against this? How can he cross examine that, your Honor? What happens to his right? That's what we are talking about.

"Of course the government finds it convenient to do it this way. They don't expose the case to cross examination." Tr.980.

#### B. Proceedings Before The Jury

#### 1. Direct Examination

Sampson Williams was called as a witness by the government, and under direct examination, testified as follows. Washington, D.C. was his home town and he had lived there most of his adult life. He knew a person named Moxie for about 15 years, and had known him quite well. He didn't know Moxie's full name but he identified him as being present in the courtroom (the defendant Marx Jackson) (Tr. 986). He also knew a person named Earl whom he had met in Washington, D.C. (Tr. 986). The prosecutor asked

him whether Earl ever offered to introduce him to a source for heroin. The witness said, "Not that I recall." (Tr. 986). The prosecutor then asked him specifically whether Earl ever offered to introduce him to a source of heroin so that he could buy heroin from this source. Again, the witness' response was, "Not that I recall." (Tr. 986). Whereupon, the prosecutor asked him whether he remembered testifying in the Grand Jury in "this proceeding." The witness said that he did. The prosecutor then asked whether it was a fact that he was asked a question and gave a certain answer. At this point, counsel for defendant Jackson objected. The Court overruled the objection (Tr. 987). Government counsel then referred to page 9 of the Grand Jury transcript and read two questions and answers from it. $\frac{22}{}$  The prosecutor then asked him whether he remembered being asked the question and giving that answer. The witness said, "No, sir, I don't". (Tr. 987) The prosecutor asked when was the last time that he saw this person Earl. The witness said he didn't remember, that it was about three or four years ago. He didn't know exactly. The witness said that he was presently incarcerated, and had been so since July, 1975. He had

<sup>22/</sup> The material was:

<sup>&</sup>quot;Q: Did there come a time when this person Earl, told you that he would like to introduce his source to you so that you could purchase heroin from this source?

<sup>&</sup>quot;A: Yes sir.

<sup>&</sup>quot;Q: And did you agree to do so?

<sup>:</sup>A: Yes sir." Tr. 987.

seen this person in Washington before going to prison. When asked whether this Earl had ever mentioned Moxie's name to him, the witness said, "Not that I can recall." (Tr. 988). The prosecutor then confronted the witness with his testimony in the Grand Jury, and asked him whether or not he had been asked certain questions and gave certain answers. 23/ Counsel for Jackson objected; and the court overruled the objection. (Tr. 989). The prosecutor continued by reading the "next question" (from the Grand Jury transcript) to the witness. 24 The prosecutor asked Mr. Williams whether he "remembered being asked those questions and giving that answer." (Tr. 989). The witness, "No, Sir I don't." (Tr. 989). The witness said that he did remember appearing in the Grand Jury, and that he testified under oath. He was next asked whether he knew Joe King. The witness said yes, and that he had met him in Washington, D.C. When asked whether he had ever talked to Joe King about narcotiecs, the witness said no. A defense objection in reference to the witness' Grand Jury testimony concerning Joe King was sustained by the Court (Tr. 991). The prosecutor then proceeded to show the witness

<sup>23/ &</sup>quot;Q: And prior to your ever meeting this source, did Earl come back to you and tell you that he had talked with a person named Moxie?

<sup>&</sup>quot;A: Yes sir." Tr. 988-989.

<sup>24/ &</sup>quot;Q: And that Moxie said he wished to keep this source for himself and that he did not want you, Mr. Williams, to deal with this source?

<sup>&</sup>quot;A: Yes sir." Tr. 989.

what had been marked as Government's Exhibit #1 as evidence in this case. 25/ The witness was told to look at the picture and was then asked if he had ever seen that person before. Williams said, "Not that I know of." (Tr. 992). He did admit seeing the photograph earlier in the prosecutor's office or at the Grand Jury. The witness was asked whether he had identified that photograph as being that of a person whom he had seen before. His answer was, "Not that I can recall." (Tr. 992). The prosecutor then asked him whether he remembered being asked certain questions and giving certain answers during his appearance at the Grand Jury. 26/ Williams said that he remembered being asked some questions about the photograph, but he didn't remember ever picking it out of any group of photographs. The witness affirmed that Government's Exhibit #1 was the same photograph as referred to as Grand Jury Exhibit #2. At this point, the prosecutor concluded his direct examination of the witness.

#### 2. Cross Examination

Counsel for the defendant Jackson undertook to cross examine the witness. The witness said that he could not recall any discussions with Earl. He was asked about one of the questions that

<sup>25/</sup> Government's Exhibit #1 was a photograph of Raymond Anderson. It was so identified by Edith Rivers (Tr. 35) and by Earl Rivers (Tr. 332).

 $<sup>\</sup>underline{26}$  ''Q: Now, has there ever been occasion when you saw this person, Moxie, in Washington, D.C., with another individual?

<sup>&</sup>quot;A: Yes, sir.

'Then I said to the grand jury reporter, 'Can I have this marked Grand Jury Exhibit 2, please.'

appeared in the Grand Jury transcript about which the prosecutor had questioned him. 27/ His attention was directed to the fact that before the Grand Jury he had answered the question, "Yes sir." He was then asked if he made the answer, "Yes sir." He said, "Not that I can recall" (Tr. 996). The witness was asked for an explanation of this (Tr. 966). He said that he didn't think his hearing was good in the Grand Jury and that he did not understand what was being said. When pressed further to explain his Grand Jury testimoney, 28/the witness said, "Evidently I didn't understand the question at that time." (Tr. 997). He was then asked as to the truthfulness of this matter. 29/ He said, "Not that I recall at no time."

<sup>&</sup>quot;Q: Mr. Williams, I am putting before you a photograph that has been marked Grand Jury Exhibit 2. Is that a photograph, to the best of your ability to determine, of the person that you saw with Moxie?

<sup>&#</sup>x27;A: I think so.

<sup>&</sup>quot;Q: Would it be fair to say that at another day prior to this when you were in my office that you picked that photograph out of a number of others, perhaps as many as a dozen as the person you believe you saw with Moxie on that occasion?

<sup>&</sup>quot;A: Yes, sir." Tr. 993.

<sup>27/</sup> See Fcotnote 22, page 26.

<sup>28/ &</sup>quot;Q: Well, Mr. Davis has confronted you with these questions and the way the matter stands, they have been presented to the jury, and I am asking you, sir, in my efforts to cross-examine you to accept the truth of what Mr. Davis has said as contained in these grand jury minutes, and I am calling upon you, sir, to tell me just what your answer, "Yes, sir:, meant to the question whether or not there came a time that Earl told you he would like to introduce his source to you so you could purchase heroin from his source, just what you meant and what you understood the question to be." Tr.997.

<sup>29/ &</sup>quot;Q: Well, did this person, Earl, tell you that he would like to introduce his source to you so you could purchase some heroin?" Tr. 997.

(Tr. 997). He said that the answer that he gave the grand jury couldn't have been a truthful answer because to his knowledge, he couldn't remember ever talking to Earl about narcotics. He had not had an opportunity to read his grand jury testimony. (Tr. 998). He was asked whether he recalled giving certain testimony before the Grand Jury, that is, he was specifically asked whether he answered certain of the questions that had been asked of him by the prosecutor, during his direct testimony (Tr. 1000-1001). In each instance, he said he did not recall giving that testimony before the Grand Jury. When further asked to give an explanation as to the meaning of the answers given by him in the Grand Jury proceedings, he said he didn't have the slightest idea. (Tr. 1001). In response to most of the questions on cross-examination about the content and meaning of the questions or answers in the Grand Jury transcript, the witness was indefinite; and even more so when asked about t uthfulness of the testimony, typically, his answers were, "Not that I can recall." (Tr. 1004). At one point, he said that he was taken before the Grand Jury against his will, and just to get out of there, he guess he just said "yes" to everything they asked. (Tr. 1002). At another point, when asked to explain the reasons for the differences between the Grand Jury testimony and his testimony in this case, he said he was in a mental state at that particular time which would be hard for him to explain. (Tr. 1005). Later, he said he was confused at the time (Tr. 1010).

Just before the prosecutor began his redirect examination of Williams, he formally offered into evidence, "the questions and answers in the grand jury that I have previously read."

(Tr. 1014). An objection by Jackson's counsel was overruled.

(Tr. 1014). The grand jury testimony, as particularized by the prosecutor, was admitted in evidence. (Tr. 1014, 1036)

Under redirect, Williams re-affirmed that his present testimony was that he did not recall the questions and answers in the grand jury. (Tr. 1014).

#### ARGUMENT

I.

ADMISSION INTO EVIDENCE OF THE GRAND JURY STATEMENTS OF SAMPSON WILLIAMS CONSTITUTED REVERSIBLE ERROR.

A. The Appellant's Contention

In this case the Court permitted the prosecution to use the grand jury testimony of a government witness, Sampson Williams, as substantive evidence under circumstances where the witness testified that he had no recollection of the Grand Jury statements; and that he had no recollection of the underlying facts, that is, the events about which the grand jury statements related. The prosecution asserted that the grand jury statements were admissible under Rule 801(d)(1)(A) of the Federal Rules of Evidence  $\frac{30}{}$  and the law in this circuit.  $\frac{31}{}$  The defendant Marx Jackson, against whom the subject evidence was offered, contends that in the facts of this case, it was error to have admitted the grand jury statements because: (1) his right of cross-examination and his rights under the Confrontation Clause of the Sixth Amendment were abridged; and (2) the "statements" were created in a manner that violated his right to due process.

<sup>30/</sup> The Rule is set out at the Addendum hereto.

<sup>31/</sup> United States v. Jordano, 521 F.2d 695, 697 (2nd Cir., 1975); United States v. Rivera, 513 F.2d 519 (2nd Cir. 1975); United States v. DeSisto, 329 F.2d 929 (2nd Cir.), cert. denied, 377 U.S. 979 (1964); Compare United States v. Cunningham, 446 F.2d 194 (2nd Cir.), cert. denied, 404 U.S. 950 (1971). (Government trial memorandum, pp.2-3).

## B. Factual Setting of the Problem

Before entering into a discussion of the controlling law principles, the appellant will set the events of the trial, leading up to the calling of Sampson Williams, as a witness by the government, in order to put the problem in perspective.

The crucial government evidence against the defendant Marx Jackson was supplied by the testimony of Earl Rivers. In fact, Rivers was the major witness against all the defendants on trial. But, as to Jackson, River's testimony was essential for conviction on the two counts on which Jackson was charged. There was scant documentary evidence available to the Government that related to Rivers' story about Jackson, and that which was introduced only circumstantially and tangentially lent support. 32/ Rivers himself was an extremely infirmed and disabled witness, whose credibility, for a number of reasons, was less than sterling. 33/ He was a very

 $<sup>\</sup>frac{32}{1}$  There were telephone books (Government's Exhibits 2, 3 and 4) said to contain telephone numbers given to Rivers by Jackson, but their origin was suspect and there was a question about their authenticity. (Tr. 210-213, 680-681, 684).

<sup>33/</sup> Rivers had sustained four adult convictions (Tr. 331,464-465): possession of stolen merchandise and forgery (1970); possession and uttering conterfeit obligations (1970); narcotics conspiracy (1976); atrocious assault and battery, and robbery(1975). Rivers had been a drug dealer before he went to jail in 1970. (Tr. 616). He was selling drugs in several locations in New Jersey. (Tr. 616). While in jail, in 1972, he began planning with Anderson to go back into the drug business as soon as he could after his release. (Tr. 332-333). Within days after getting out, he went into a drug buying and distribution partnership with two people from Baltimore. (Tr. 624-625). He was a drug user at one time. (Tr. 271). He became an informer for the Drug Enforcement Agency sometime in 1974; occasionally he received payments from the Agency. (Tr. 610). His "cooperation" with the D.E.A., which included giving testimony in this case, was

impeached witness.

Rivers' account of Jackson's involvement in the alleged conspiracy was briefly as follows: On January 16, 1974, Rivers came to Washington, D.C. with Anderson and a female and male companion of Anderson to find Joe King. King owed Anderson some money for drugs that Anderson had let him have on consignment. In Washington the group stopped on a street which was an area of social activity. Several restaurants, bars and after-hours clubs are located there. (Tr. 209, 671-674). Marx Jackson was a frequenter of this area. (Tr. 209, 676-677). Rivers, who knew Jackson casually and also knew that Jackson and Anderson were acquainted, saw Jackson standing nearby when the car Anderson and Rivers were in reached 9th Street. Rivers called Anderson's attention to Jackson. Anderson told Rivers to go get him and bring him over. Anderson and the others went into Harrington's restaurant. Rivers went to get Jackson. As Rivers and Jackson were entering the restant to join Anderson, Rivers spoke to Sampson Williams, who was standing in the doorway.

The prosecutor asked Rivers to relate the conversation that he had with Williams. Counsel for Jackson objected and before the Court ruled on the objection, the prosecutor changed direction and turned his questioning to the next step in the sequence of events.  $\frac{34}{}$ 

the result of a deal that he made with the Government for intercession in his Pennsylvania case, for which he was awaiting sentence. (Tr. 612-613). He admitted that he was testifying in this case principally to benefit himself. (Tr. 612).

<sup>34/</sup> Tr. 389-390.

The prosecutor passed over bringing out from Rivers the details of the conversation between he and Williams, not because the Court sustained counsel's objection, but because he elected to do so. The importance of the prosecutor's failure to pursue the questioning of Rivers to elicit his testimony about the conversation, will be discussed later. Notably, the prosecutor did not adduce from Rivers' testimony any conversations that he had with Williams about any subject!

Rivers continued his testimony about the events of that evening. He and Jackson went into the restaurant and joined Anderson at the bar. A conversation took place between Rivers and Jackson. At one point he got up to walk away, turned, and started to say something to Williams. Jackson stopped him and said: "Boy, look, don't say nothing to anybody, boy, I can get all this." Rivers said he left them to go to the restroom. When he came back, the party went to the Aspen Inn. The next day, after Rivers had arranged for Anderson to see King, the group went back to New York. In New York, Anderson gave Rivers some drugs to deliver to Jackson in Washington. He left with the drugs and traveled to Washington by bus. He met Jackson and gave the drugs to him. On two later occasions, at the request of Jackson, he went to Anderson in New York and got drugs and brought them to Jackson in Washington. On one of these trips, Edith Rivers accompanied him.

For all the reasons noted above, Rivers' credibility was such that his story was badly in need of corroboration. Edith Rivers'

testimony to some extent corroborated Rivers' testimony about Jackson. But she was also impeachable. 35/

To buttress Rivers' testimony about Jackson, the prosecutor made a decision to call Sampson Williams as a witness. In February, 1976, Williams was serving a prison term. He was brought to New York and interviewed by the prosecutor and or D.E.A. agents in this case. As a consequence of this interview, Williams appeared before the Grand Jury on February 24. Initially, he refused to answer questions, asserting his privilege against self incrimination. Pursuant to 18 U.S.C. \$6002, he was conferred immunity by a District Court Judge. He, thereupon, answered questions before the Grand Jury. His "testimony" is startling, because it absolutely lacks content or substance. The portion of it that was introduced into evidence appears at the Appendix for Marx Jackson. It is not overly long, and, omitting the protion where the prosecutor cautioned him about being under oath, it is as follows:

"Q Now, Mr. Williams, do you know a person named Earl?

"A Yes, sir.

"Q Would it be fair to say that you have seen him in Washington, D.C.?

"Yes, sir.

"Q Did there come a time when this person, Earl, told you that he would like to introduce his source to you so that you could purchase heroin from this source?

"A Yes, sir.

"Q And did you agree to do so?

"A Yes, sir.

<sup>35/</sup> She was a heroin user. (Tr. 125-126). She had pleaded guilty in this case, and was awaiting sentence. She testified for the government under an arrangement. The prosecutor had promised to talk to the sentencing Judge about her cooperation. (Tr. 113-114). She admitted that she couldn't remember dates too good. (Tr. 242-243), 244). She was hesitant to mention even simple truths about herself, such as whether she was in fact married to Earl Rivers. (Tr. 243-244).

"Q And prior to your ever meeting this source, did Earl come back to you and tell you that he had talked with a person named Moxie?

"A Yes, sir.

"Q And that Moxie had said that he wished to keep this source for himself, and that he did not want you, Mr. Williams, to deal with this source? "A Yes, sir.

"Q Now, has there ever been an occasion when you saw this person, Moxie, in Washington, D.C., with another individual?

"A Yes, sir.

"MR. DAVIS: Can I have this marked Grand Jury's Exhibit 2, please?

"(So marked.)

"Q Mr. Williams, I am putting before you a photograph that has been marked Grand Jury's Exhibit 2.
"Is that a photograph, to the best of your ability to determine, of the person that you saw with Moxie?
"A I think so.

"Q Would it be fair to say that at another day, prior to this, when you were in my office, that you picked that photograph out of a number of others, perhaps as many as a dozen, as the person you believe you saw with Moxie on that occasion?

"A Yes, sir." (Appendix, pp.114-123).

What Sampson Williams said in his Grand Jury appearance, as can be seen, is, in the main, not testimony, as such, but the affirmation of a series of questions. The questions, except those dealing with the showing of Anderson's picture, all relate to something that Rivers is supposed to have said to Williams. Typically, the prosecutor asked him whether or not Rivers told him a certain thing; and uniformly, his answer was, "Yes, sir."

The prosecutor, armed with the Grand Jury transcript, and fortified by the Court's ruling that he could use the transcript as substantive evidence, called Williams as the Government's witness.

On direct examination of Williams, the prosecutor's questions tracked those asked of him before the Grand Jury. To each question

the witness responded to the effect that he could not recall the event. The prosecutor then asked him about his answer to the identical question in the Grand Jury, to which the witness also answered that he could not recall giving the testimony.

Under cross examination by Jackson's attorney, Sampson Williams gave an encore. He could not recall the event about which the prosecutor questioned him; nor, could he recall being asked the question in the grand jury or giving the answers that appeared in the transcript.

The situation did not improve on redirect examination by the prosecutor. Williams said that he could not recall the statements (questions and answers) before the Grand Jury.

## C. Application of Rule 801

### (1) Elements of the Rule

Rule 801(d)(1)(A) of the Federal Rules of Evidence codifies the so-called "minority rule" concerning the substantive evidentiary use of prior inconsistent statements. The Second Circuit has long been an adherent of this minority rule.  $\frac{36}{}$  The formulation by the provisions of Rule 801(d)(1)(A) consists of four qualifications.

<sup>36/</sup> United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964) cert. denied, 377 U.S. 979 (1964). In DeSisto, the court departed from the "orthodox" or "majority' rule, "to the limited extent of allowing prior inconsistent trial or grand jury testimony of a witness which was subject to cross-examination at the trial to be used as affirmative evidence." U.S. vs. Briggs, 457 F.2d 908, 910 (2nd Cir. 1972), cert. denied 404 U.S. 950, 92 S.Ct. 302, 30 L.Ed.2d 266 (1971).

Under the Rule, a prior statement of a witness is not hearsay (and is thus admitted substantively):

- (1) if the declarant testifies at the trial;
- (2) if he is subject to cross examination concerning the statement;
- (3) if the statement is inconsistent with his testimony at the trial;
- (4) if the statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

If the grand jury testimony of Sampson Williams, which was admitted into evidence in this case, were indeed "statements" under the rule (our counter-contention is developed later herein), then, plainly, qualifications (1), (3), and (4), above, were satisfied. Williams did testify (1), his grand jury statements were inconsistent with his trial testimony (3), and grand jury statements are clearly included in qualification (4).  $\frac{37}{}$ 

# (2) Denial in This Case of the Right to Cross-Examination/to Confrontation

Sampson Williams was a witness in this case only in the sense that he was called to the witness stand in open court and in the presence of the jury took an oath. He gave no meaningful testimony, and, certainly, none toward which cross-examination could be directed.

It was clearly the prosecutor's plan in calling Williams as a witness to elicit testimony from him that he had been told by Rivers that Rivers was going to introduce him to his source of heroin; and

 $<sup>\</sup>frac{37}{Pp}$ . See discussion at 4 Weinstein, supra, of legislative history.  $\frac{37}{Pp}$ . 801, 24, 25.

that Rivers came back to him and \_ \_d that the defendant Marx Jackson had told him not to (introduce the source to Williams). In the view of the prosecutor, Williams had so testified before the grand jury. Therefore, if Williams, as a government witness at the trial, did not give the same responses as he had before the grand jury, the prosecutor intended to use Williams' grand jury statements as substantive evidence in the case, that is, to establish the truth of the events. However, when Williams was asked the crucial question about whether Rivers ever offered to introduce him to his source, his answer was, "Not that I recall." (Tr. 986). The prosecutor then read to him the Grand Jury statements, and asked Williams if he remembered it. Williams answered, "No, I don't." The prosecutor then asked Williams about his grand jury statement regarding Earl telling him that Moxie wanted to keep the source for himself. (Tr. 988-989). When asked if he remembered being asked those questions and giving the answers, Williams said: "No, sir, I don't." (Tr. 189). The same kind of answers were given by Williams (that he did not recall) when he was questioned about his grand jury identification of Anderson's photograph. (Tr. 992-993).

When Jackson's counsel questioned Williams on cross-examination, his responses were the same. (Tr. 996,999, 1001). Counsel made repeated efforts through his questioning to have the witness explain his grand jury statements. (Tr. 996,997,999,1002). This, too, was unavailing because Williams persisted that he could not recall his answers.

Despite this being the state of the record, the trial court admitted the grand jury "statements" in evidence. The assertion by appellant is that this was error because, in the circumstances, there had been a failure of one of the prerequisites to admission of the prior statement under Rule 801, in that, the witness was not "subject to cross-examination concerning the statement." The situation encountered in this case regarding the witness Sampson Williams, is not unprecedented.

In 4 Weinstein's Evidence (United States Rules) at p. 801-77, the hypothetical is posed that a prosecution witness (W) has previously stated in circumstances covered by Rule 801(d)(1)(A) that he saw the defendant (D) shoot X. Six different responses are considered and discussed, among them, is that W testifies at the trial, "I don't remember ever saying that before the grand jury and I don't remember anything about what happened." (801-97). Weinstein's analysis of this situation is:

"This is the situation in which it is most likely that the statement will have to be excluded unless it comes within Rules 804(a)(2) and (b)(1) or some other exception. Unless W says something more, gives some details about the event in question, there will be nothing to which cross-examination can be directed. When a witness denies making the statement he may at times offer reasons to substantiate his claim -- as for instance, that he was out of town the day the statement was allegedly made. When the witness denies recollection, all such opportunities for refuting the making of the statement dicappear. Neither the making of the statement nor the truth of the statement can be adequately tested if W denies all memory. In this situation the prior statement if admitted would truly become the present testimony of the witness because there is not other testimony of the witness relating to the event on record. The statement would become the present testimony even though it had never been subject to cross-examination.

Such a result is contrary to the scheme of the federal rules even as adopted by the Supreme Court and would probably violate the constitutional right of confrontation as well." Id. 801-97.

Upon the particular facts in the hypothetical, Weinstein's analysis of the problem and his reasoning are sound. His conclusion, as will be demonstrated herein, is a correct one. The factual situation presented in the example is narrow and precise; and is indisputably identical to that in the instant case: (1) Sampson Williams made statements before the grand jury; (2) he was called as a government witness to testify in accordance with his prior grand jury statements; (3) when he was questioned about the events, comprising the subject of his grand jury statements, he said that he did not remember the events; (4) when he was asked on direct examination about his prior statements, he said that he did not remember making them; (5) his responses on cross examination about the events and about his prior statements, continued to that he did not remember either; (6) his prior statements were a litted in evidence for their substantive value.

Discussion and resolution of the question whether under the facts in this case, the defendant's constitutional right to confrontation was abridged must be approached from the starting point of the Supreme Court's holding in the case of <u>California v. Green</u>, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Under the California law involved in the <u>Green</u> case, a prior inconsistent statement was not rendered inadmissible by the hearsay rule if the witness was given the opportunity to explain or deny the statement at some point

in the trial. At the criminal trial of the defendant Green for furnishing marijuana to a minor named Porter, two prior statements of Porter were admitted as substantive evidence under this law. The first statement was an oral one made by Porter to a police officer (Wade) while Porter was in custody for selling marijuana to an undercover policeman. In the statement Porter said that Green had called him earlier and asked him to sell some "grass"; and had on that afternoon delivered a shopping bag of marijuana to Porter, a portion of which had been sold to the undercover officer. The other statement of Porter was made later, in the form of testimony given at Green's preliminary hearing. Porter said that Green supplied the marijuana, but claimed that instead of personally delivering it, Green had shown him where to pick up the shopping bag, which was hidden in the bushes at Green's parents' house. Green's attorney cross-examined Porter extensively at the preliminary hearing.

At Green's trial, Porter was the state's chief witness. He was "markedly evasive and unccoperative" on the stand. He admitted that Green had called him and asked him to sell some unidentified "stuff". He admitted obtaining the shopping bag of marijuana shortly after the call and that he had sold some of it. When pressed as to whether Green had been his supplier, he claimed that he was uncertain as to how be obtained the marijuana because he was high on LSD. At various points during the direct examination the prosecutor read excerpts from Porter's preliminary hearing testimony, which was admitted under the statute for the truth of the matter con-

tained in it. Porter "guessed" that his statements in the transcript that he had obtained the marijuana from the bushes at Green's parents' house, were true. On cross-examination, Porter said that the transcript refreshed his memory of what he had said at the preliminary hearing, but not the events themselves. about which he was still unsure. Later in the trial, Office Wade testified, relating Porter's earlier statment that Green had personally delivered the marijuana. This statement was also admitted as substantive evidence. Porter admitted making the statement and insisted that he had been telling the truth in both statements as he believed it, but also claimed that he was telling the truth in his testimony that he could not remember the actual events.

Green was convicted and his conviction was reversed in the state appellate courts on the grounds that the statute that authorized the admission of the statements as substantive evidence was unconstitutional in that it violated rights under the Confrontation Clause. The California Supreme Court, following its earlier opinion in another case, construed the Confrontation Clause to require the exclusion of Porter's preliminary hearing testimony, because neither the right to cross-examine Porter at the trial, nor the right to cross-examine him at the hearing, satisfied the demands of the Sixth Amendment of clause. The Supreme Court found the State Court wrong on both counts.

In the course of its opinion, the Supreme Court fully explored the history of the Confrontation Clause and the Court's earlier decisions interpreting and applying it. At one point, the Court said,

significantly, insofar as the instant case (the appellant Jackson's) is concerned, that:

"Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.

"This conclusion is supported by comparing the purposes of confrontation with the alleged dangers in admitting an out-of-court statement. Confrontation: (1) insures that the witness will give his statements under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

"Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial." ... (Footnote Omitted) 399 U.S. at pp. 158-159.

The ruling of the California Court that the state statute was unconstitutional as applied to the preliminary hearing statement of Porter, was reversed by the Supreme Court. However, the Supreme Court reserved the question of whether the admission of Porter's statement to Officer Wade (that Green had given him the marijuana) did or did not abridge Green's rights under the Confrontation Clause, in view of Porter's trial testimony that he could not remember the events related in the statement. In this regard, the Court said:

"There is a narrow question lurking in this case concerning the admissibility of Porter's statements to Officer Wade. In the typical case to which the California court addressed itself, the witness at trial gives a version of the ultimate events different from that given on a prior occasion. In such a case, as our holding in Part II makes clear, we find little reason to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given. The subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, off-hand remark to a stranger, and the carefully recorded testimony at a prior hearing. Here, however, Porter claimed at trial that he could not remember the events that occurred after respondent telephoned him and hence failed to give any current version of the more important events described in his earlier statement.

"Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture. The State court did not focus on this precise question, which was irrelevant given its broader and erroneous premise that an out-of-c art statement of a witness is inadmissible as substantive evidence, whatever the lature of the opportunity to cross-examine at the t .1. Nor has either party addressed itself to the question. Its resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses relevant to this particular issue..."(Footnote omitted) 399 U.S. at pp. 165-169.

California v. Green, supra, teaches that, "the Confrontation Clause is not violated by admitting a declarant's out of Court statements, as long as the declarant is testifying as a witness and [is] subject to full and effective cross-examination." 309 U.S.

158. When Sampson Williams, the declarant in this case, sat upon the witness stand and consistenly offered that he remembered nothing about the events in question, and remembered nothing about having given a statement about the events, he was not "testify up as a witness." He gave no testimony at all. However, his earlier statements were admitted for the truth of what it contained. Though cross-examination was not afforded at the time Williams ade the earlier statement, the defendant's right to confrontation assured "full and effective cross-examination at the time of trial." Id. p. 159. "Confrontation...forces the witness to submit to cross-examination...

"The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard."

(Footnote Omitted) 400 U.S. p. 88.

The question that is more fundamental and vital is: did the particular defendant have the right of confrontation on the issue of whether the speaker (in this case Rivers) actually made the statement related by (Williams in this case). Dutton v. Evans, supra, 400 U.S. at p. 87. This can only be achieved by meaningful cross-examination.

<sup>38/</sup> It can well be argued under the facts of this case that the statements contained in the grand jury minutes were not the statements of Williams, but those of Rivers. The important evidence that the prosecutor was attempting to lay before the jury in this episode with Williams, was not Williams' statement about what he had said or done but that he had heard certain things, i.e., that Rivers had told him about his source, was going to introduce Williams to the source, but that the defendant told him (Rivers) not to. The point as to whether the verbal portion of the statements were the words of the witness or someone else's seems to be of little consequence in terms of the confrontation question, because in <u>Dutton v. Evans</u>, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213., the Court remarked that:

nation ...." Id. p. 168. When Williams maintained the same posture on cross-examination, as he had on direct, his "lapse of memory so affected [Jackson's] right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case." Id. p. 168.

In the later case of <u>Dutton v. Evans</u>, supra (ft. nt.38), the Supreme Court reiterated the principles announced in <u>Green</u>. The Court made this point in the following language:

"The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." California v. Green, 399 U.S., at 161 26 L.Ed.2d at 499. ..." 400 U.S. 74, at p. 89.

In <u>Dutton</u>, supra, the Court had to determine whether a Georgia state law, which broadened the co-conspirator exception to the hearsay rule beyond the limits of the federal exception, impinged on the defendant's rights under the Confrontation Clause. The facts were that a prosecution witness testified to a declaration made to him by the defendant's co-conspirator after the termination of the conspiracy. The co-conspirator whose remarks were reported in the statement was not on trial and did not appear as a witness in the case. Finding that the defendant had fully and extensively crossexamined the witness on the subject of his testimony, the Court held that the defendant's rights under the Confrontation Clause had been protected.

The right to confrontation means more, than what took place in the case of the appellant Jackson. Certainly, Jackson, through his counsel, was allowed to confront Williams physically; and even to ask him questions on cross-examination. But, because of the nature of Williams' responses on direct examination, which portrayed a lapse of memory, and the carry over of this deficiency into the cross-examination, the defendant's rights were not fulfilled. The witness Williams, was used by the prosecutor as a conduit by which to transport into the evidence of this case a certain grand jury statement. He gave no testimony on direct, concerning the subject matter of the statements; and the admissibility of the statement under the terms of Rule 801(d)(1)(A) depended upon Williams being "subject to cross-examination concerning the statement." The right to cross-examination, within the application of the Confrontation Clause, was never available to the defendant Jackson.

In all material respects, it was as if Williams were not present at the time, or. had not been sworn as a witness. In United States v. Fiore, 443 F.2d 112 (2 Cir., 1971), cert. denied, 410 U.S. 984, 85 S.Ct. 1510, 36 L.Ed.2d 1510 (1973) the Court had such a factual situation before it. Bennett, a government informer had testified before a grand jury about the purchase of drugs from the defendant (the subject matter of the trial). He experienced a change of mind about testifying and was brought into Court forcibly by marshals and narcotics agents - while the jury was absent. In the presence of the jury, he refused to be sworn and, moreover, refused to testify. The prosecutor asked him questions, which were met with refusals to answer or ignorance and forgetfulness. The

Court permitted the prosecutor to question Bennett as a hostile witness. This was followed by a series of questions about his grand jury testimony, including extensive reading from the minutes. All questions put to the witness about the statements evoked answers to the effect that he didn't recall, or out and out refusals. Later in the trial, the court reporter, who attended the grand jury proceedings, was called as a witness, and authenticated the questions and answers. The delayed motion of defense counsel to strike Bennett's testimony was denied. The defendant was convicted; and on appeal this Court reversed, saying, in part:

"In these cases [cited by the Government] the witness had been sworn and was available for meaningful cross-examination on the issue whether his present alleged lack of recollection of the defendant's participation in the crime or his previous sworn testimony to the contrary was the truth indeed, although this is not decisive, in De Sisto, the alleged lack of specific recollection had been brought out in cross-examination itself. Similarly Rule 801 of the proposed Federal Rules of Evidence, in defining certain prior statements as not nearsay, limits the definition to cases where "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," 51 F.R.D. at 413, see also at 415, 416. Our decisions, and the considerably broader proposal in Rule 801, rest on Wigmore's view that "The whole purpose of the Hearsay rule has been already satisfied [because] the witness is present and subject to cross-examination [and] [t]here is ample opportunity to test him as to the basis for his former statement." 3 Evidence \$1018 (3d ed. 1940), quoted in California v. Green, 399 U.S. 149, 155, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Here Bennett was not subject to cross-examination by the defendant, both because he had refused to take the oath and thus was not a witness at all and because he had made it evident that he would refuse to give testimony of any sort. Under such circumstances the admission of his grand jury testimony would appear to

offend not only the hearsay rule, even in the liberalized form adopted by this circuit, see 3A Wigmore, Evidence §1018 at 997-998 (Chadbourn rev. 1970), but the confrontation clause of the Sixth Amendment as well, <u>Douglas v. Alabama</u>, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965)." (Footnote Omitted) 443 F.2d at p. 115.

In <u>Davis v. Alaska</u>, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, the Supreme Court, defined, at great length, the right to cross-examination, as it is included in the Sixth Amendment Confrontation Clause:

"The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965). Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418, 13 L. Ed.2d 934, 85 S.Ct. 1074 (1965). Professor Wigmore stated:

"'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers....'

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. ..." 400 U.S. 308, at pp. 315-316.

As noted, the Supreme Court, in the case of <u>California v.</u>

<u>Green</u>, supra, reserved for decision the question, whether the apparent lapse of memory by a witness about the events in question and the lapse of memory about the making of an earlier statement, constitutes such a critical difference in the application of the Confrontation Clause, as to make inadmissible the earlier statement. The question, thus, is an open one. However, several Federal Circuits have encountered the fact situation that gives rise to this question. The reasoning in the cases have not been consistent, though the results have been somewhat uniform.

In United States v. Insana, (423 F.2d 1165 (2 Cir. 1971), cert. denied, 400 U.S. 841, 91 S.Ct. 83, 27 L.Ed.2d 76), the facts were markedly different from those in the present case. One Shurman who had been a confederate of the Defendant Insana and others, in the criminal conspiracy, the mail fraud charges and other related offenses charged in the case, decided to cooperate with the government. Before Shurman was indicted, he appeared before the grand jury on the advice of his attorney and testified in full detail. Shortly afterwards, with counsel present, he gave a full statement in the office of the United States Attorney. However, he experienced a change of heart about the matter. When the case against Insana was being prepared for trial, he advised the office of the prosecutor that he did not want to testify against Insana. Nonetheless, he was subpoenaed as a government witness. When he took the stand under direct examination; he became unresponsive and eventually declared that he didn't want to hurt nobody. In furtherance of this declara-

tion, he also claimed lack of memory when asked to identify a document. In a hearing out of the presence of the jury, the trial judge determined that the witness was avoiding testifying because he didn't want to hurt the defendant. The court entered into a sharp rebuke of Shurman. When the witness continued under direct examination, he mumbled and gave vague answers. The prosecutor was permitted to impeach him by use of his grand jury testimony, he equivocated about whether he had been asked those questions and given the answers. He said he guess he did or that he must have. Essentially, his answers were to the effect that he didn't remember. The defendant's attorney did not cross-examine the witness, rather he moved to strike the grand jury testimony from the record. On the appeal from his conviction in the case, it was claimed by the defendant, that there was a denial of his Sixth Amendment right to confrontation, because he could not effectively cross-examine Shurman about the grand jury statements, since Shurman had stated that he could not remember the relevant facts. This Court disagreed, holding that Shurman was at all times available for cross-examination. Nor was this Court convinced that cross-examination would have been fruitless, in view of the witness' obvious desire to help the defendant. Finally, on the subject, this Court said, "nor does the failure of the defendant to cross-examine because he believes such examination would be fruitless render the witness unavailable for such examination." 423 F.2d at p. 1168.

The features that distinguish <u>Insana</u> from the present case, are patent. In <u>Insana</u>: (1) the witness openly declared beforehand that he did not want to testify against the defendant; (2) his reasons, given in open court, were that he didn't want to hurt any-

one (and especially the defendant); (3) the trial court determined that the witness was faking; (4) the defendant never raised an objection to the manner in which the prosecution proceeded in using the prior statements of the witness, until the direct examination was completed; (5) the defendant made no effort to cross-examine the witness, being content to surmise only, that it would be ineffective.

In United States Ex. Rel. Thomas v. Cuyler, 548 F.2d 460 (3 Cir. 1977) the defendant (Thomas) had been convicted in a state criminal trial where one of the prosecution witnesses (Gwaltney) testified that he was in the Defendant's company shortly after the incident (a shooting) had taken place. He then testified that he could remember nothing further. The state made reference to the witness' prior statement to the police. In the statement, the witness had inculpated the defendant in the offense. The witness testified that he remembered making the statement, but could not remember what he had said. The prosecutor read the ent statement to the witness in the form of questioning as to whether he remembered the assertions contained in the questions. On appeal from his conviction in the case, the defendant raised as one of the issues that he had been deprived of his constitutional rights under the Sixth Amendment, because Gwaltney's alleged lack of memory rendered his right of cross-examination as to the contents of the statement "illusory in fact." 548 F.2d at p. 462. In addressing this contention, the Circuit Court adverted to the fact that the question had not been decided by the Supreme Court, having been expressly reserved in California v. Green, supra. The Court turned to the concurring opinion of Justice Harlan in <u>Green</u> (399 U.S. at pp. 188-190), and utilizing the reasoning and conclusions of Justice Harlan, determined that the defendant's rights under the Confrontation Clause were satisfied where the witness has been sworn and made available.

"We are constrained to adopt the view enunciated by Justice Harlan in his concurring opinion in California v. Green and followed in the cases cited in the note. We recognize, of course, that a witness whose prior statement is to be used must not only be produced but must also be sworn and made available for cross-examination. A witness who refuses to be sworn or to testify at all or one who, having been sworn, declines to testify on Fifth Amendment grounds, has not been thus made available for cross-examination. But if he has been sworn and made available the fact that he suffers or feigns a loss of memory does not lessen the fact that the defendant has been confronted with him and presented with the opportunity to cross-examine him to the extent possible, which is all that the Sixth Amendment requires. We, accordingly, hold that the use which the Commonwealth in the present case made of Gwaltney's prior statement did not offend the Confrontation Clause of the Sixth Amendment, either because of the fact that Gwaltney was not subject to cross-examination when it was made or because of the fact that he claimed a loss of memory when it was sought to cross-examine him about it." 548 F.2d p. 463.

In <u>United States v. Infelice</u>, 506 F.2d 1356 (7 Cir., 1974) cert.denied, 419 U.S. 876, 96 S.Ct. 138, 42 L.Ed.2d 115 (1974), the chief government witness against the defendants showed an inability on cross-examination to recall some of the matters about which he was questioned. To many of the questions, concerning dates and the contents of conversations, his answers were that he was "unable

to recall". Upon an appeal of the convictions in the case, it was claimed that the witness' lapse of memory on cross-examination, deprived the defendant of his Sixth Amendment right to confront witnesses. In answering this contention, and while affirming the conviction in the process, the Circuit Court stated the rule, as follows:

"The determination of whether a defendant's sixth amendment right to confrontation has been violated depends upon whether defendant has been deprived of the right to test the truth of the direct testimony." 508 F.2d at p. 1363.

The Court noted that the lapse of memory was not comparable to  $\frac{39}{}$  a refusal to answer questions. The defendant in <u>Infelice</u>, the Court said, was not deprived of the right to test the knowledge-ability and credibility of the witness. The memory of the witness was weak and thus, the Court observed, cast doubt on his credibility.

Finally, in <u>United States v. Shoupe</u>, 548 F.2d 626 (6 Cir. 1977) there is dicta supporting the admission of the statements in this case, 548 F.2d 643.

More recent Circuit Court opinions, noted above,  $\frac{40}{\text{all}}$ 

<sup>39/</sup> Parenthetically, it can be observed that the lapse of memory in Infelice was not total and complete, as it was in this case.

<sup>40/</sup> Thomas v. Cuyler, supra, United States v. Sharpe, supra. And to these cases can be added the Fourth Circuit case of United States v. Payne, 492 F.2d 449 (4 Cir. 1974), cert. denied 419 U.S. 876, 96 S.Ct. 138, 42 L.Ed.2d 115 (1974), which reaches a curious result on facts that seem to impel a different result. Weinstein finds the conclusion in Payne "somewhat dubious." 4 Weinstein, Evidence, Supplement: Volume 4, pp. 801-97 (1976). In two later Fourth Circuit opinions the Court attempts to harmonize

lean toward the admission of prior statements in circumstances which are similar, or nearly so, to the facts in the present case. The appellant submits that these cases are leaning in the wrong direction, because in their holdings the right to confrontation is made subservient to the development of the hearsay rule and its exceptions. Where hearsay is admitted in conflict with the Sixth Amendment, the Amendment must control. (United States v. Payne, 492 F.2d 449 (4 Cir. 1974)(Cir. J. Widener, dissenting, p. 464).

#### D. Rivers As The Declarant

The confrontation issue in this case must also be viewed from the perspective that it was the statement of Rivers, not Sampson Williams', that the prosecutor designed to get before the jury. An examination of the grand jury statements establishes that the statements were, in fact, the declarations of Rivers. This was the fact pattern of <u>Dutton v. Evans</u>, supra. While Rivers was a witness in the case, the prosecutor made no sincere effort to question him about the statements he made to Williams. He certainly was not restrained from doing so.

the holding in <u>Payne</u> with existing law. See <u>Martin v. United States</u>, 528 F.2d 1157 (4 Cir. 1975) and <u>Lee v. United States</u>, 540 F.2d 1210 (4 Cir. 1976). There is a dissent in <u>Payne</u> (per Widener, Cir. J.), which is extremely thoughtful and well reasoned. It exhaustively examines the history of the Sixth Amendment and, it seems to appellant, by a process of analyzing that history and the development of the hearsay rules, correctly determines the proper relationship between the two.

There was a point during his testimony that the prosecutor started to ask Rivers about a conversation with Sampson Williams. The details of this incident have already been explored, supra at page 34. It can be speculated, but not with certainty, that this is when the alleged statement may have been made. If this is so, it is apparent that the prosecutor did not seek to have Rivers testify about them. At the close of the prosecution case, Sampson Williams was called as a witness for the sole purpose, as it developed, of having him testify about what Rivers is alleged to have said. This evidence, however, did not come forth from the lips of Williams, so, resort was had to the grand jury statement. If, indeed, as the appellant Jackson now argues, the statement was that of Rivers, the confrontation issue exists in relation to Rivers as the declarant. The fact situation in Dutton v. Evans, as indicated, was that the witness on the stand related the oral statement of an absent co-conspirator. In the instant case, the witness (Williams) was used to relate the statement of another (Rivers), and this was done by the device of a co-called prior inconsistent statement of the witness. In both situations, in Dutton and in this case, the confrontation issue looms.

"The <u>Dutton</u> plurality sets forth the issue to be considered in determining whether the confrontation clause has been violated. The test, as restated by the Court is whether 'under the circumstances, the unavailability of the defendant for cross-examination deprived the jury of a satisfactory basis for evaluating the truth of the extrajudicial declarations.' <u>United States v. Adams</u>, 446 F.2d 681, 683 (9 Cir.), cert.

denied 404 U.S. 943, 92 S.Ct. 294, 30 L.Ed.2d 257 (1971). Whether a defendant was denied the right to confrontation and cross-examination must be resolved case by case based on an examination of all the circumstances and evidence." United States v. Snow, 521 F.2d 730, cert. denied, 423 U.S. 1090, 96 S.Ct. 883, 47 L.Ed.2d 101 (9 Cir. 1975).

Whether taken to be the statements of either Williams or Rivers, "indicia of reliability" concerning them are noticeably absent. Dutton v. Evans, supra, 400 U.S. at p. 88. On the part of Rivers, the statements are wholly self-serving, not merely from the ordinary viewpoint; but due to his role in this case as the chief government witness, his motivation to fabricate incriminating evidence against Jackson was high. The statement that Jackson told Rivers not to introduce Williams to the source, is of low evidentiary value because it is historical and narrative in nature. If the statements are those of Williams, his motive to fabricate would rest on the fact that the prosecutor had promised that if he cooperated with the government, the prosecutor offered to write to the Parole Board in his behalf. Williams had nothing to contribute to the advancement of the case, except to affirm that Rivers at some time in the distant past had made certain statements to him. During the hearing out of the presence of the jury, before he was called as a witness, Williams expressed ignorance about the government's offer to write the letter to the Parole Board.

E. Due Process Considerations Bar The Admission Of The Grand Jury Statements In This Case.

Apart from the defendant's ight to confrontation which is mandated by the requirements of the Sixth Amendment, and the provisions of Rule 801 (d)(1)(A), as prerequisite to the admission of the grand jury statements, there are due process considerations, that must be, and were not, met before evidentiary use could be made of the statement. The foregoing discussion presupposed that the grand jury statement was obtained under circumstances and in a manner that assured that the defendant was not overreached.

With the enactment of Rule 801(d)(1)(A) of the Federal Rules of Evidence, it has been predicted that prosecutors "will greatly increase the number of witnesses whom they present to the grand jury." Blakey, Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence, 64 Ky.L.J. 3 (1975-1976) p.9, ft.n. 29. Another scholar observed that, "most prior inconsistent statements used at trial are given under circumstances where there are subtle and sometimes severe pressures operating to skew the story one way or the other." 4 Weinstein's Evidence, supra, 801-74. There is, of course, a certain solemnity of the official occasion that attends grand jury proceedings" and oath, plus a stenographic record reduces possibilities of overreaching by the questioner and carelessness by the witness." Id. 801-77.

Solemnity of the official occasion notwithstanding, the appearance of Sampson Williams before the grand jury was, little other than a situation where the prosecutor took full advantage of the ex parte, private nature of the situation to feed Williams questions that required only an affirmation on his part. All the crucial questions, that is, the ones that the prosecutor eventually used as a prior inconsistent statement, called for hearsay. Every one of these questions concerned matters that Rivers allegedly said to Williams. And every question was framed to produce a "yes" answer. None of the questions contained a time frame, or a place location, not even a city where allegedly the conversations occurred. The absence of time frame was absolute. All the deficiencies in the grand jury process were carefully called to the attention of the trial court before the grand jury statement was utilized by the prosecutor. The defendant Jackson complained that the manner in which the questions were asked, the nature of the answers that were given, all added up to a flagrant violation of his rights to due process. The defendant renews this complaint here; and urges that his conviction should be reversed.

#### ARGUMENT

II.

# THERE WAS NO VENUE IN THE DISTRICT COURT FOR THE OFFENSE CHARGED IN COUNT SIX

Count Six of the indictment, the only substantive count in which appellant Marx Jackson is charged in this case, alleges that:

"In or about the month of February, 1974, in Southern District of New York, RAYMOND ANDERSON and MARX JACKSON, a/k/a "Moxie, the defendants, unlawfully, intentionally and knowingly did distribute a Schedule I narcotic drug controlled substance, to wit, approximately one eighth kilogram of heroin." (Title 21, United States Code, Sections 812, 841 (a)(1) and 841 (b)(1)(A)."

Appellant here asserts that there was no evidence presented by the prosecution in this trial which proved or tended to prove that he (Marx Jackson) was in the Southern District of New York at the time alleged, it following then, that he could not have committed the acts constituting this crime at the time and in the said district. Thus we argue that venue was improperly laid in the Southern District of New York, and the District Court committed reversible error in refusing to grant defendant's written motion to dismiss count six. (See Appendix, p. ).

Count Six and the corresponding Overt Act 14,  $\frac{42}{}$  charges

 $<sup>\</sup>frac{41}{\text{Spiracy}}$  As noted supra, Jackson is charged in the Count One Conspiracy which binds all the defendants together.

 $<sup>\</sup>frac{42}{\text{son}}$ , "(14) In or about February, 1974 the defendant Marx Jackson, a/k/a "Moxie" purchased approximately one eighth Kilogram of heroin and one eighth kilogram of cocaine."

appellant Jackson (along with Lefendant Raymond Anderson) with the purchase (in the Southern District of New York) and possession (in the Southern District of New York) with the intention to distribute certain controlled narcotic substances. In the Bill of Particulars (Appendix, p. ), filed by the United States in response to the motion of the defendant, in conjunction with the testimony of the government witness Earl Rivers, it is clear that these acts were purported to have taken place on a public street in Washington, D.C. and not in the Southern District of New York.

"The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. This principle is reflected in numerous statutory enactments, including Rule 18, Fed. Rules Crim. Proc, which provides that except as otherwise permitted, 'the prosecution shall be had in a district in which the offense was committed....'"(Footnote Omitted.) United States v. Cores, 356 U.S. 407-408 (1958).

The situation in the present case is very much like that in <u>United States v. Mancino</u>, (District Court, Southern District of New York, 1960) 179 F. Supp. 897. There the defendant was charged by indictment returned in the Southern District of New York with two offenses under the United States narcotic laws. The first count charged that on or about September 22, 1958 he did unlawfully receive, possess, conceal and facilitate the transportation and concealment of 86 grams of heroin. The second count charged that from the period September 1, 1958 to the return of the indictment, in the Southern District of New York, "the

defendant and David Schumacher, named as a co-conspirator, but not as a defendant, and others unknown unlawfully combined, conspired and confederated and agreed together and with each other to violate sections 173 and 174 of Title 21, U.S.C.A." The only overt act charged in pursuance of the conspiracy was that on or about September 22, 1958 the said Schumacher did in the Southern District have in his possession 86 grams of heroin. The Court found that the evidence showed that on September 15, 1958 the defendant left his residence in Brooklyn, New York and went to a bar, also in Brooklyn. There he met Schumacher and they had a conversation. The defendant left the bar, went home, and returned to the bar. He appeared to give something to Schumacher. On September 22, 1958 the defendant was again at the same bar. Schumacher entered and they had a conversation. Schumacher gave the defendant some money. The defendant went to his home and in a few minutes returned to the bar and gave Schumacher a brown paper bag. Schumacher left the bar in a few minutes. He was followed by agents and was seen to take a taxi to a location in Manhattan, where the cab stopped. The agents alighted from their car and when Schumacher saw them he threw two glassine envelopes to the ground that contained heroin. The agents entered the cab that he was riding in and searched him. Inside his pocket the agents found a brown bag similar to the one that the agents had seen delivered to him by the defendant. The bag contained two glassine envelopes of heroin. The agents had Schumacher under constant observation from the time he left the bar until he was

arrested. He had not spoken or met with anyone. On these facts the Court found that there was sufficient proof to establish beyond a reasonable doubt that the package which passed from the defendant to Schumacher contained the envelopes of heroin which were later found in Schumacher's pocket when he was arrested. The Court next considered the question of whether there was any proof that either count in the indictment had been committed in the Southern District of New York where the indictment was filed. The Court quickly ruled that as to the first count there was no proof that venue existed in the Court. All of the transactions concerning the defendant had taken place in Brooklyn in the Eastern District of New York. Turning to the conspiracy count the Court said:

"Likewise, so far as the second count of the indictment is concerned, there is no proof that any conspiracy took place in the Southern District of New York or that any acts in pursuance of a conspiracy took place in the Southern District of New The only evidence adduced in connection with the conspiracy was evidence relating to the substantive crime alleged in the first count of the indictment. There was no proof from which any inference could be drawn that such crime was part of a conspiracy to transport narcotics from the Eastern District of New York to the Southern District of New York. As far as the evidence would indicate, the transaction was completed when Mancino delivered the heroin to Schumacher. What Schumacher did thereafter was not connected with any conspiracy to transport narcotics, so far as Mancino was con-There is no proof that Mancino knew that the heroin was to be taken outside of the Eastern District of New York. A single purchase alone is not sufficient to prove that the purchaser is a participator in a conspiracy to violate the narcotics laws. See United States v. Aviles, 2 Cir., 1960, 274 F.2d 179.

"There was no proof that there was an offense started in the Eastern District of New York and completed in this district and, therefore Section 3237 of Title 18 of the U.S.C. is not applicable to the venue for this prosecution.

"The crime, if any, was committed in its entirety in the Eastern District of New York." 179 F. Supp. at p. 897.

The <u>Mancino</u> case is apposite to the instant one and its reasoning is sound. See also <u>United States v. Sweig</u>, 310 F. Supp. 1148, 1159-1162.

It has been said that "... questions of venue 'raise deep issues of public policy'...." <u>Cores</u>, supra, at p. 408. One accused of a crime should not have to suffer the burden and hardship of facing prosecution and trial in distant places.

#### ARGUMENT

#### III.

# ADOPTION BY APPELLANT JACKSON OF THE ARGUMENTS OF CO-APPELLANTS

The appellant Marx Jackson hereby adopts the following arguments of the co-appellants Arletha Franklin and Virgil White:

- 1. The Government's Proof Showed Several Conspiracies
  Rather Than One.
- The Court Erred In Failing To Give The Jury Guidance
   On What Constitutes A Simple Versus Multiple
   Conspiracy.

ADDENDUM



#### ADDENDUM-1

# CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

# AMENDMENTS TO THE UN! O STATES CONSTITUTION

## Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual serve in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

# FEDERAL RULES OF CRIMINAL PROCEDURE

# Rule 18. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

### FEDERAL RULES OF EVIDENCE

#### Rule 801-Definitions

The following definitions apply under this Article:

- (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conject of a person, if it is intended by him as ar assertion.
- (b) <u>Declarant</u>. A "declarant" is person who makes a statement.
- (c) <u>Hearsay</u>. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
- (d) Statements which are not Hearsay. A statement is not hearsay if --
  - (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or
  - (2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

### CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that 2 copies of the foregoing Brief and 1 copy of the separate Appendix, both for the appellant Marx R. Jackson, were served personally on Robert B. Fiske, Esq., United States Attorney, United States Courthouse Annex, One St. Andrews Plaza, New York, New York 10007 and service by mail, postage prepaid, to Mayrose Friedman, Esq., Attorney for Appellant Arletha Franklin, 501 Madison Avenue, New York, New York 10022; and Jerome Allan Landau, Esq., Attorney for Appellant Virgil White, 401 Broadway, New York, New York 10013, this 12th day of April, 1977.

JOHN A. SHORTER, JP.